Holland & Knight

800 17th Street, NW, Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

August 29, 2012

The Honorable Ken Salazar
Secretary of the Interior
United States Department of Interior
1849 C Street, N.W.
Washington DC 20240

Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act: Consideration of Candidate Species

Dear Secretary Salazar:

On behalf of the National Association of Homebuilders ("NAHB") we are informing you of our intent to file a civil suit against the United States Fish and Wildlife Service (the "Service") for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), and the Administrative Procedure Act 5 U.S.C. §§ 551 *et. seq.* ("APA"). This letter is delivered to you pursuant to the 60-day notice requirement of 16 U.S.C. §1540(g)(2)(C). NAHB intends to file a civil suit under Section 11 for the Services' failure "to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C § 1540(g)(I)(C). NAHB intends to seek declaratory and injunctive relief to correct and enjoin the actions of the Service pertaining to the process for determining the listing status of species under Section 4 of the ESA. In filing suit, NAHB will challenge two settlement agreements entered into by the Service that dictate the timing and order of listing decisions for species where the Service has previously determined that listing is "warranted but precluded." We will also seek legal fees and costs associated with the legal action.

In 2011 the Service settled a series of lawsuits with two environmental advocacy organizations, WildEarth Guardians ("WEG") and Center for Biological Diversity ("CBD"), concerning the Service's consideration of petitions to list species as threatened or endangered.[1] By agreeing to a rigid schedule for acting on listing decisions, the Service abandoned the statutorily required process for determining the priority of listing rulemakings. Specifically, the

[1] On September 9, 2011, the United States District Court for the District of Columbia approved two separate stipulated settlement agreements with environmental advocacy groups: (1) an agreement with WildEarth Guardians ("WEG"), filed on May 10, 2011; and (2) an agreement with Center for Biological Diversity ("CBD"), filed on July 12, 2011 (collectively the "Agreements"). *In Re: Endangered Species Act Section 4 Deadline Litigation,* MDL No. 2165, Case No. 10-377 (D.D.C) (Dkt. # 42-1).

Service has forgone the required process for 251 species where there has been a "warranted but precluded" finding. NAHB's members have a vested interest in that process and have been harmed by this violation of the ESA.

A. The ESA requires the Service to make case-by-case determinations concerning the status of species and listing priorities.

Under the ESA, a species will be added to the list of "endangered" species if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). An endangered determination is to be made by the Secretary "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." 16 U.S.C. § 1533(b)(l)(A).

The ESA provides that within 12 months of receiving a petition to have the species listed, the Service must complete its review and must make a finding that listing is either: (1) not warranted; (2) warranted (in which case the Service must publish a proposed rule to list the species in the Federal Register); or (3) warranted, but precluded by higher listing priorities. 16 U.S.C. § 1533(b)(3)(B). If the Service decides a listing is warranted but precluded, the ESA requires the Federal Register notice to include "a description and evaluation of the reasons and data on which the finding is based." 16 U.S.C. § 1533(b)(3)(B)(iii). Such species are commonly known as a "candidate" species.[2] The published findings supporting a determination that listing is "warranted but precluded" is important to the regulated community. They provide public notice of species that are likely to become the subject of proposed listing rules and allow public agencies, private landowners, and other interested parties to respond appropriately.

The ESA requires that when the Secretary makes a warranted but precluded finding on a petition, such a petition be treated as one that is resubmitted on the date of such a finding. 16 U.S.C. § 1533(b)(3)(C)(i). Thus, the cycle is repeated — the Service must make findings on candidate species on an annual basis and again determine whether listing is (1) not warranted, (2) warranted, or (3) warranted but precluded. Warranted but precluded decisions are judicially reviewable. 16 U.S.C. § 1533(b)(3)(C)(ii).

The Service is required to have in place a "system to monitor effectively the status of all species with respect to which a" warranted but precluded finding is made. 16 U.S.C. § 1533(b)(3)(C)(iii). After the Service has published its decision that a listing is warranted but precluded, it must show it is making "expeditious progress" to list, delist, or reclassify the species. 16 U.S.C. § 1533(b)(3)(B)(iii)(II). The Service is required to enact guidelines that set forth "a ranking system to assist in the identification of species that should receive priority review" for listing. 16 U.S.C. § 1533(h)(3). As with other decisions of the Service, the agency is expected to determine listing priorities based on the "best available" scientific information.

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[2] According to the Service: "A candidate species is one for which we have on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher priority listing actions." 75 Fed. Reg. 69222 (11/10/10).

Since 1975 the Service has published the Candidate Notice of Review (CNOR) in the Federal Register.[3] Among the stated purposes of the CNOR are:

> to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; to request input from interested parties to help us identify those candidate species that may not require protection under the Act or additional species that may require the Act's protections; and to request necessary information for setting priorities for preparing listing proposals.

76 Fed. Reg. at 69370-71. Thus, the Service incentivizes private landowners to set aside land to reduce threats or keep species off the list.[4] Further, the Service solicits a wide range of information from the public concerning candidate species. Such information and efforts are used by the Service for changing the priority ranking, in future listing decisions, and for removing the species from the candidate list.

The 2011 CNOR summarizes the status of 244 candidate species and assigns a listing priority number ("LPN") for each species. The LPN ranges from 1 to 12 depending on magnitude of the threat, the immediacy of the threat and taxonomic status — the lower the LPN, the higher the listing priority. This LPN ranking is based on guidance published by the Service in 1983.[5] As explained by the Service, "the LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species."[6] LPNs can be changed (*i.e.* a species' priority lowered) due to efforts to reduce threats or information demonstrating that the threat was not as significant as the Service thought.

NAHB's members have a significant interest in the listing process given that they have candidate species and habitat on their land. First, if impacts to candidate species can be avoided, the likelihood that they will require the protection of the Act in the future is reduced. As noted in the CNOR, the Service uses the public process of candidate review to stimulate landowners to set aside land and undertake other conservation efforts to protect species. In turn, landowners fund research to help the Service identify those candidate species that may not require protection. Hence, there are many ways in which the regulated community takes direct action to deal with the presence of candidate species either to try to keep a species off the list or to change the LPN to allow for further effort (which allows the Service to focus on other priorities).

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[3] The current CNOR was published in 2011. See Department of Interior, Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 Fed. Reg. 66370- 66439 (10/26/11).

[4] USFWS notes that the agency "strongly encourage[s] collaborative conservation efforts for candidate species, and offer[s] technical and financial assistance to facilitate such efforts." 76 Fed. Reg. at 66371.

[5] Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098 (September 21, 1983) (the "LNP Guidelines").

[6] 76 Fed. Reg. at 66371.

Second, while candidate species do not receive the direct legal protections of listed species, their presence has an impact on land-planning given that these species by definition may warrant future protection under the Act. Hence, it is not uncommon for NAHB's members to address the potential impacts to candidate species in long-range land-planning decisions. Indeed, the Service itself encourages parties (both private and federal agencies) to identify candidate species and to plan for avoidance and mitigation (including during the Section 7 consultation process, for Section 10 HCPs and through candidate conservation agreements).

In sum, the regulated community has a significant role in the process for addressing candidate species. The CNOR has served as a roadmap for the regulated community to understand the Service's listing priorities (embodied in the LPN) and to analyze the potential impact of candidate species. Considerable resources are expended to address candidate species.

B. The Settlement Agreements provide a process that is inconsistent with the ESA.

The Settlement Agreements set forth a rigid schedule (a "work-plan") for the Service to complete listing rulemakings on the 251 candidate species that were on the 2010 CNOR — with a certain number of species considered each year and all 251 species competed "no later than September 20, 2016." This is inconsistent with the ESA, prior Service policy and best available science.

The ESA requires the Service to consider whether the listing of a candidate species is warranted but precluded. By entering into the Agreements, the Service abandoned the statutorily required process for reevaluating candidate species. During the annual review, the Service will no longer consider whether listing is warranted but precluded for any candidate species that is slated for a rulemaking that year under the Agreements. For such species, the Service has limited itself to considering only whether listing is warranted or not warranted — with an obviously high probability of the former given that the prior finding was that listing was warranted but precluded by higher priorities.[7]

Under Section 4, decisions concerning listing priority must be based on a ranking system that is founded on best available science. The Agreements predetermine the priority of listings irrespective of the current status of the species (including information provided to the Service such as ongoing research and conservation efforts), the prior LPN of the species, or any analysis of relative priority. By predetermining the order for all 251 species based on a litigation settlement, the ranking system of the LPN has been rendered moot. In turn, the CNOR has been replaced by a process that was negotiated with WEG and the CBD behind closed doors. The Service ignores the requirement that listing priority be based on an analysis of several factors; with species becoming higher and lower priories depending on the annual review.

Under the Agreements there is a provision allowing the Service to establish earlier deadlines. However, there is no provision allowing dates to be pushed back. Under the LPN Guidelines, the listing priorities must be changed or the species removed from the candidate list based on the information and efforts solicited in the CNOR. With the effective elimination of

[7] This is explicitly stated in the Agreement with CBD: "Defendants shall submit a Proposed Rule or a not-warranted finding to the Federal Register for the following species no later than the end of the specified Fiscal Year. . . ."

this process, the Service predetermined the rankings regardless of best available science. Furthermore, the Settlement Agreements allow for dates to be shifted by the CBD or WEG if they chose to file subsequent suits on other species or upon agreement by the parties. Thus, the Service has ceded its discretion to these groups to determine priorities. The Service will go forward with listing rulemakings in a static order even if this is inconsistent with best available science.

C. NAHB's Members have been harmed by being cut out of the listing process.

Consistent with the CNOR, NAHB's members regularly provide information and undertake conservation efforts in order to lower certain species' priority on the candidate list and as well as to demonstrate that listing is not warranted. As discussed above, land-planning decisions of NAHB's members are directly impacted by the presence of candidate species. However, due to the Agreements, NAHB's members have been cut out of the candidate species process. All of the stated purposes of the CNOR are mooted by the Service's decision to allow two parties to determine the priorities of the listing program — no longer will the Service have the discretion to find that a listing is warranted but precluded by higher priorities if that species has been slated for decision that fiscal year and the LPN Guidance has been made irrelevant. The information provided by NAHBs members and the conservation efforts that are undertaken by private landowners to reduce threats to the species have been rendered moot.

The following are some of the more egregious examples of how the Agreement affects the regulated community:

- The Service will publish a listing decision for several subspecies of the Mazama Pocket Gopher (*Thomomys mazama*) and several other terrestrial species in the "South Puget Prairie ecosystem" by FY 2012. The LPN for the Pocket Gopher has ranged from 6 to 3. However, recent and ongoing studies by the Washington Department of Fish and Game indicate that there are fewer subspecific designations and that their numbers may be greater than previously thought. In turn, conservation efforts are ongoing. More comprehensive information on the species and their habitat would, at the very least, lower the priority ranking of this species.
- On August 21, 2012 the Service announced the proposed listing decisions for 4 Texas salamanders (Salado, Georgetown, Jollyville Plateau, and Austin blind salamanders). The LPN for two of these species is 8. Hundreds of thousands of dollars have been expended on studies (commissioned by Williamson County) challenging the taxonomic classification of the three distinct salamander species found in Austin, Texas. In turn, proactive conservation efforts have been made by landowners to establish candidate conservation agreements with assurances and land has been set aside for the salamander. The decision to proceed with this listing process under the Agreements conflicts with the Service's prior determination that more research was warranted for the Georgetown salamander and to downgrade the LPN from 2 to 8.

There are numerous other species where best available science is being ignored in favor of WEG's and the CBD's preferences.

In summary, the ESA authorizes NAHB to file suit for the Secretary's failure to perform any nondiscretionary act relating to 16 U.S.C. § 1533. 16 U.S.C. § 1540(g)(I)(C). The 60-day notice is intended to provide you an opportunity to correct the actions taken in violation of the ESA by withdrawing the Agreements and returning to a public, science-based process. We appreciate your consideration of the claims described in this notice and hope that the Service will quickly act to resolve these issues.

Sincerely yours,

Rafe Petersen

cc: Daniel M. Ashe, Director U.S. Fish and Wildlife Service

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